Rudy Darius Ogou v Ming Court Hotel, Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–149 OF 1998
KC VOHRAH J
19 SEPTEMBER 2000

Labour Law — *Employment — Termination — Misconduct — Issue of show cause letter, whether victimization — Whether fundamental breach of contract of employment*

The claimant worked as assistant manager with the respondent ('the hotel'). The claimant sent a letter of resignation to the hotel and claimed that he had been constructively dismissed. The matter came up before the Industrial Court. The claimant alleged that there were acts of victimization on the part of the hotel, inter alia: (i) being issued a caution letter; (ii) being issued with a letter to show cause for breach of house rules; (iii) being suspended (with full pay) pending investigation; and (iv) being made subject to a domestic inquiry. The Industrial Court examined each complaint and found on the basis of the totality of the evidence adduced in the proceedings that the conduct of the hotel did not amount to a fundamental breach of the claimant's contract of employment going to the root of the contract nor did the hotel evince an intention no longer to be bound by it. The Industrial Court was of the view that the various steps taken at the hotel in dealing with what the hotel perceived as breaches of discipline were measures to administer discipline and that these were done bona fide. The claimant applied for an order of certiorari to quash the award of the Industrial Court.

Held, dismissing the application:

(1) The Industrial Court made a finding of fact which was borne out by the evidence adduced and the court could not see that it arrived at an erroneous factual conclusion or that there was no evidence to support the conclusion warranting this court to intervene through judicial review on a pure finding of fact (see p 785G).

(2) The finding of the Industrial Court was clear and straightforward that the hotel did no wrong for issuing the show cause letter and conducting the investigation. The finding could not be faulted for error of law. The issuance of the show cause letter was part and parcel of the investigation and it also gave the claimant an opportunity to explain the alleged misconduct for alleged breach of the house rule. The court could not see how it could have constituted an act of victimization. The show cause letter could not amount to a fundamental breach of the contract of employment (see p 786C, E–F).

(3) There was nothing in the pleadings to say that the findings of the domestic inquiry were contrary to the evidence. Therefore, there was nothing perverse in the Industrial Court's findings that the holding of the domestic inquiry was not a breach of the contract of employment (see p 788A).

[Bahasa Malaysia summary

Pihak yang menuntut bekerja sebagai penolong pengurus bersama responden ('hotel tersebut'). Beliau telah menghantar sepucuk surat kepada hotel tersebut dan mendakwa bahawa beliau telah dipecat secara konstruktif. Perkara ini dihadapkan ke Mahkamah Perusahaan. Pihak yang menuntut membuat dakwaan bahawa wujud tindakan pemangsaan di pihak hotel tersebut, antara lain, beliau: (i) telah diberikan surat amaran; (ii) telah diberikan satu surat tunjuk sebab kerana melanggar peraturan-peraturan dalaman; (iii) telah digantung (dengan gaji penuh) sementara siasatan selesai; dan (iv) telah dijadikan subjek kepada siasatan domestik. Mahkamah Perusahaan telah memeriksa setiap aduan dan menemui pada asasnya keseluruhan keterangan yang dikemukakan di dalam prosiding tersebut bahawa tindakan hotel tersebut tidak membawa kepada satu pelanggran asasi sehingga ke dasarnya kontrak pekerjaan pihak yang menuntut dan hotel tersebut tidak juga memperlihatkan niat untuk tidak terikat pada kontrak tersebut. Mahkamah Perusahaan berpendapat bahawa beberapa langkah yang diambil oleh hotel tersebut dalam menangani apa yang dianggap oleh hotel tersebut sebagai pelanggaran displin merupakan langkah-langkah untuk mengawal displin dan bahawa ia telah dilakukan secara bona fide. Pihak yang menuntut memohon satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan.

Diputuskan, menolak permohonan tersebut:

(1) Mahkamah Perusahaan telah membuat penemuan fakta yang dibuktikan oleh keterangan yang telah dikemukakan dan mahkamah ini tidak dapat melihat bahawa Mahkamah Perusahaan telah tiba kepada satu kesimpulan faktual yang khilaf atau bahawa tidak terdapat keterangan untuk menyokong kesimpulan tersebut bagi mewajarkan mahkamah ini untuk campur tangan melalui kajian semula kehakiman atas penemuan fakta yang jelas (lihat ms 785G).

(2) Penemuan Mahkamah Perusahaan adalah jelas dan terus-terang bahawa hotel tersebut tidak salah di dalam mengeluarkan surat tunjuk sebab dan mengendalikan siasatan. Penemuan tersebut tidak boleh dijadikan sebab kekhilafan dari segi undang-undang. Pengeluaran surat tunjuk sebab tersebut merupakan sebahagian siasatan tersebut dan ia juga memberikan pihak yang menuntut satu peluang untuk menerangkan dakwaan salah laku terhadap dakwaan pelanggaran peraturan dalaman. Mahkamah tidak dapat

melihat bagaimana ia telah melakukan tindakan pemangsaan. Surat tunjuk sebab tidak boleh membawa kepada satu pelanggaran asasi kontrak pekerjaan (lihat ms 786C, E–F).

(3) Tiada apa-apa di dalam pliding yang mngatakan bahawa penemuan siasatan dometik bertentangan dengan keterangan tersebut. Oleh demikian, tiada apa yang bertentangan dengan penemuan Mahkamah Perusahaan bahawa keputusan siasatan domestik tersebut adalah satu pelanggaran kentrak pekerjaan (lihat ms 788A).]

Notes

For cases on termination of service generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 943–976.

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Wong Chee Hong v Cathay Organization (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Rules of the High Court 1980 O 53 r 1(2)

N Sivanesan (Vicknaraj, RD Ratnam, Rajesh Kumar & Associates) for the applicant.

Peh Lee Kheng (YN Foo & Partners) for the respondent.

KC Vohrah J: This is an application for an order of certiorari to quash Industrial Court Award No 610 of 1998.

Rudy Darius Ogou, the claimant, worked as the assistant manager, front office, with Ming Court Hotel (KL) Sdn Bhd ('the hotel').

On 5 May 1997, he sent a letter of resignation to the personnel & training manager of the hotel and in the letter he claimed that he had been constructively dismissed.

The matter came up before the Industrial Court. The claimant pleaded in his statement of the case, and in his case before the court he predicated his case on constructive dismissal based on a litany of alleged acts of victimization on the part of the hotel and which, he alleged, cumulatively compelled him to tender his resignation and leave the hotel. The Industrial Court in its award examined the allegations of wrongs claimed by the claimant as having been committed by the hotel and found that they had not been made out and it concluded that there was no constructive dismissal.

Before this court the claimant contends that the Industrial Court had committed several errors of law which vitiated the award which can be summarised as failure to have due regard to the pleadings, deciding on matters not pleaded, taking irrelevant matters into consideration and failure to take matters into consideration. These matters were set out in the statement under O 53 r 1(2) of the Rules of the High Court 1980, but there was no condescension to particulars as to what these are. The hotel counters this argument by saying that what the claimant has asked this court to do is to act as an appeal court to reverse the findings of facts made by the Industrial Court (which the High Court is prohibited from doing); that the Industrial Court in fact had not committed errors of law; that in the rare intervention allowed on findings of facts relating to reliance upon on an erroneous factual conclusion or where there is no evidence to support a conclusion (see the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145), this had not been made out.

The applicant was first appointed as a night auditor by the hotel with effect from 7 March 1994. On 1 January 1996, he was re-designated as assistant manager at the front office and confirmed as such on 1 September 1996.

He sent in a letter dated 5 May 1997, calling it a letter of resignation, to the personnel and training manager of the hotel and gave four reasons for doing so and claimed constructive dismissal. The letter reads as follows:

> Dear madam,
>
> *Re: 24 hours resignation notice*
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> Referring to the above, I am hereby tendering my 24 hours resignation notice effective this hour because of the following reasons:
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> Point 1
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> I cannot extend working here any more due to the management making *untrue allegations* toward me committing a serious misconduct and claiming that I have breached, inter-alia, House Rule No 44, that is, theft, fraud, misappropriation,embezzlement and dishonesty in that I have collected an amount of RM230 for room rental of Room 708, En Zainoh bin Musa. The management also claimed that I had deprived the company's income, which is not true — please refer to my earlier explanation.
>
> Point 2
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> Further, a domestic inquiry was held on 5 April 1997 on the 2nd Floor, Ming 8, at 9.00am and during the domestic inquiry, there were ten management witnesses present and I was alone. As a result of the domestic inquiry, I received two separate letters, both dated 8 April 1997, which I received on different days. The first letter I received from you required me to report for duty on 9 April 1997, for shift 11.00pm to 7.00am. When I reported for duty on 9 April 1997 at about 10.45pm, before I entered, I received another caution letter from the resident manager, Mr Joshua Gan. The letter was handed to me by Miss Anna Soon, public relations manager. The letter said that I was found GUILTY in the domestic inquiry which ws held on 5 April 1997.

Point 3

I worked two days after (that was on 11 April 1997) and received another misconduct letter from the front office manager, Ms Julie Poon, asking me what action should be taken toward me as an assistant manager on duty, as one of the front office assistants, Miss Gaithri, was found listening to her Walkman while on duty. This was seen by Mr Peter Kirschner at 6.30am on 10 April 1997 after he had just come back from jogging.

Point 4

Finally, I am dissatisfied with the two year period in which I did not get any bonus.

With the above points, I certainly believe that there could also be discrimination, favouritism and prejudice. However, I have tried my best to continue working here but am unable to due to this situation becoming worse.

Therefore, I still consider this situation to be *constructive dismissal* and I would like to refer this matter to the proper channel (authorized body) to look into the necessary steps of how this can be solved according to the law.

Thank you.

Yours sincerely,

Rudy Darius Ogou
Assistant Manager

In his amended statement of claim, the four reasons given in the letter were repeated and additional reasons were given for claiming constructive dismissal were added. In summary, the alleged acts of victimization (I have dropped those abandoned by the claimant) are as follows:

(1) Being instructed in December 1996 not to air grievances of staff members in the assistant manager's log book.

(2) Being issued a caution letter for not forwarding to Mr Kirschner, the director of operations of the hotel, a fax from his daughter which was received at 1.55am on 11 February 1996, but which was not forwarded to Mr Kirschner until 6am.

(3) Being issued a letter to show cause for breach of house rules on the ground that he had released a room to a customer and had failed to check that in into the computer 'ECCO System'; and had collected RM230 but failed to hand the said amount to the office cashier; and when he was suspended for 14 days on half pay from 12 March 1997 pending investigations.

(4) Being suspended for another two weeks with full pay pending further investigations.

(5) Being made subject to a domestic inquiry where he had four charges preferred against him for breach of a house rule relating to negligence and carelessness in the performance of his official work for (a) failing to enter the sale of a room into the ECCO Computer System; (b) failing to comply with standard procedure to issue a temporary receipt for the payment of room rental; (c) failing to ensure that the

proper registration form in respect of the room rate was completed; (d) failing, if the form was completed, to keep it on record .

(6) Being issued a letter of caution after the domestic inquiry found him guilty on charges (a) and (b).

(7) Being issued a letter asking for an explanation as to what action had been taken by him in respect of a staff member who was found listening to her 'Walkman' while on duty.

The Industrial Court, except for the alleged act of victimization described in para (2) above, examined each complaint and found on the basis of the totality of the evidence adduced in the proceedings, that the conduct of the hotel did not amount to a fundamental breach of the claimant's contract of employment going to the root of the contract nor did Hotel evince an intention no longer to be bound by it (the chairman of the Industrial Court earlier in the award had cited the Supreme Court case of *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92 for the principle he adopted for his conclusion). And in the body of the award, quite clearly he was of the view that the various steps taken at the hotel in dealing with what the hotel perceived as breaches of discipline were measures to administer discipline and that these were done bona fide.

Taking his complaint shown in para (1), the claimant had complained that the hotel was not happy when he wrote of the grievances of himself and others in the assistant manager's log book sometime in 1996. The chairman had this to say:

> He was advised not to write anything of any grievances in the said book as it was not meant for that but to do so through proper channels. He was not a member of any union, as admitted by him, and as such, the court considered that by writing grievances on other's behalf as well he had made himself a self appointed spokesman. No organisation would want to condone such an act and, if he proceeded in doing so, it would be tantamount to a misconduct as it may lead to an industrial dispute. Therefore it was considered proper for the company to stop him from writing in the log book and the issue stopped at that. If the claimant still insisted that it was right for him to do such a thing he should within reasonable time leave the company. Since he did not do so but continued working in the company he ought not to bring this matter up again. The court considered this as an afterthought by him.

The learned chairman made a finding of fact which was borne out by the evidence adduced and I cannot see that he arrived at an erroneous factual conclusion or that there is no evidence to support the conclusion warranting this court to intervene though judicial review on a pure finding of fact.

There is an overlapping of matters in regard to points 1 and 2 in his letter of resignation and these matters are elaborated upon under paras (3) to (6) which are a summary of the matters complained of in his amended statement of claim.

The claimant was alleged to have sold a room to a guest without properly recording it and with failure to hand over the room rental to the front office cashier on duty. He was issued a letter (the show cause letter) alleging a breach of House Rule 44 relating to theft, fraud, misappropriation

or embezzlement, dishonesty in connection with the hotel's business, property or funds and asking for an explanation why disciplinary action should not be taken against him.

He was suspended for 14 days on half pay pending investigations and he was advised that if the investigations did not establish a prima facie case against him he would be restored to his full wages. The claimant sent in an explanation letter. The hotel needed time to close investigations and the suspension was continued for a further 2 weeks with him on full pay.

It will be seen there was a basis for the hotel to hold investigations into the circumstances of the sale of the hotel room for which no record of the sale had been made. It was the claimant who was the assistant front office manager on duty that night.

The hotel did not claim at the stage of the show cause letter that he was guilty of any offence. It stated investigations would be carried out. The finding of the Industrial Court was clear and straightforward that the hotel did no wrong in pursuing that cause of action.

> The claimant was put on two weeks suspension on half pay and when the investigation by the company could not be completed within the two weeks the claimant was further suspended but on full pay. The court saw nothing wrong in this as it was the prerogative of the company to do so provided it was done bona fide which the court found there was nothing not done bona fide at all. Furthermore the company wanted to make sure of the allegations made against the claimant before they formally charged the claimant at the domestic inquiry (hereinafter to be called DI only) held on 5 April 1997.

The finding cannot be faulted for error of law.

The issuance of the show cause letter was part and parcel of the investigation, and it also gave him an opportunity to explain the alleged misconduct for alleged breach of the house rules, and I cannot understand how it could have constituted an act of victimization. The show cause letter cannot amount to a fundamental breach of the contract of employment.

The claimant's counsel has argued that the Industrial Court had failed to take into account that the evidence of the claimant established that he was not guilty of breach of House Rule No 44, but it has to be noted that the show cause letter did not accuse the claimant of a breach of House Rule 44 and in fact no disciplinary punishment was meted out in relation to House Rule 44 at all. The show cause letter was a normal show cause letter advising that investigations would be carried out.

As a result of the investigations carried out by the hotel, a domestic inquiry was convened, not in respect of the breach of House Rule 44 (relating to theft, fraud, etc), but under a different house rule in relation to negligence and carelessness of duty. There were four charges against him on negligence and carelessness:

(a) failing to enter the sale of a room into the 'ECCO' computer system;

(b) failing to comply with standard procedure to issue a temporary receipt for the payment of the room rental;

(c) failing to ensure a proper registration form in respect of the room rented out was completed;

(d) failing, if the form was completed, to keep it on record.

The domestic inquiry found the claimant guilty on charges (a) and (b) and the hotel issued him a letter of caution in respect of these two charges.

The chairman of the Industrial Court dealt with the matter of the domestic inquiry and it is quite clear from the tenor of what he had to say that the holding of the domestic inquiry and the punishment meted out was not a fundamental breach of the contract of employment. The claimant complained that the hotel had produced ten witnesses against the claimant. The chairman of the Industrial Court stated,

> Claimant was given notice if he had any documentary evidence or any witnesses for the DI (he had to produce them) but he did not do so. There were four charges against the claimant at the DI but the company found the claimant guilty only on two charges. However, the company did not dismiss the claimant but only gave him a letter of caution which the court considered a mildest form of disciplinary action taken by the company ...

The claimant's counsel had argued that the claimant did not have time to prepare for the domestic inquiry and that neither a member of the domestic inquiry panel was called to give evidence nor notes of proceedings produced during the proceedings at the Industrial Court, and he contends these were relevant considerations which the Industrial Court failed to take into account.

The claimant never raised the issue of not having time to prepare for the domestic inquiry before, nor was there any evidence led that the claimant had applied at the domestic inquiry for more time and was refused. As for the non production of the notes of proceedings, he should have asked for the production of the notes if he had intended to rely on them. The claimant did not specifically state in any of the four points in his letter of resignation nor plead in his amended statement of case that the finding of negligence and carelessness on two charges by the domestic inquiry was wrong. What was alleged in the letter and the pleadings was that the holding of the domestic inquiry was an act of victimization which breached his contract of employment. The Industrial Court obviously did not think so and, again, I do not see how the court can interfere with the findings which are not shown to be perverse.

I noticed that the submissions of counsel for the claimant has dealt with bits of evidence here and there in the notes of proceedings and there is an invitation to the court to draw inferences of fact contrary to what the learned chairman has done. But of course this court cannot do that as that would be interfering with the Industrial Court's findings of fact. It is not necessary for this court to decide whether there was evidence that 2 charges in the domestic inquiry had been made. The issue was whether the convening of the domestic inquiry and the issuance of a letter of caution after the domestic inquiry had found him guilty on the two charges were acts of victimization and in regard to these the Industrial Court had replied that

they were not. There was nothing in the pleadings to say that the findings of the domestic inquiry were contrary to the evidence. I, therefore, see nothing perverse in the Industrial Court's findings that the holding of the domestic inquiry was not a breach of the contract of employment.

We now come to Point 3 in the claimant's letter and para (7) of the summary of grievances of his Amended Statement of Case which I set out earlier in this decision. The claimant was issued with a letter asking for an explanation as what action had been taken by him in respect of one staff member, one Miss Gaithrie, who was found listening to her 'Walkman' while on duty. The chairman of the Industrial Court had this to say,

> The claimant also alleged that on 11 April 1997 he received a letter from the front office manager, COW2, ... asking him, as the most senior officer on duty at night, about one employee named Miss Gaithrie who was found listening to her Walkman while on duty at about 6.30 am. The claimant gave a reply ... and as there was no further development on this, there was no evidence to show that the company had penalized him ...

The chairman added that as the company (the hotel) did not pursue the matter about Miss Gaithrie and as no action was taken against him on the matter it showed that the company had not breached his contract of service and that even if there was a breach, it was not sufficiently important to justify him to resign. The chairman was emphatic that as such Point 3 in the claimant's letter claiming constructive dismissal was vexatious and of no merit. I see no error of law in his coming to that conclusion.

The chairman had not dealt with the issue of the fax which was not delivered to Mr Kirschner, the director of operations of the hotel — see para (2) of the summary of grievances set out earlier in the decision. A fax from his daughter was received at 1.55 am on 11 February 1997 and it was not forwarded to him until 6 am that morning. The claimant was issued with a caution letter on the matter although he explained why it was delivered late. But from his letter it is quite clear he did not deliver the fax immediately and it is also quite clear from his letter that a delivery would be made immediately only when the fax is urgent. He was cautioned for taking it upon himself to decide when a fax was urgent. Although the Industrial Court did not expressly deal with the matter it seems clear that the chairman would have come to the same conclusion as this court that there were valid grounds for the issuance of the caution letter. The chairman's omission to deal with the matter did not affect his global view of all the evidence adduced and his finding that none of the alleged acts of victimization by the hotel (with which he dealt) with was made out. If the caution letter issued subsequent to the late delivery of the fax had been considered an act of victimization, it would have stuck out like a sore thumb and attracted specific treatment instead of being relegated to an omnibus finding that 'on the totality of the evidence adduced and from s 30(s) Industrial Relations Act 1967, the court found that the conduct of the company did not amount to a fundamental breach going to the root of the claimant's contract or (that the hotel) evinced an intention no longer to be bound by it.' The Industrial Court then dismissed the claim of constructive dismissal.

A I see no role for this court to intervene to review the award on the basis of error of law. As was pointed out, if 'cumulative misconduct is being urged, it must be pleaded and evidence has to be given that each (act of) misconduct was so connected with the culminating act of misconduct as to form part of the same transaction' (see *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 at p 607). Here the Industrial Court had found B that none of the allegations of misconduct of the hotel had been made, let alone being so connected as to form the same transaction, and let alone there being a culminating act of misconduct.

Application dismissed with costs.

C Reported by Jafisah Jaafar

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